UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/821,011	04/08/2004	Christian Limburger	J105U002US00	9317

33893 7590 10/14/2009

JLB CONSULTING, INC.
c/o INTELLEVATE
P.O. BOX 52050
MINNEAPOLIS, MN 55402

EXAMINER	
SHAPIRO, JEFFERY A	

ART UNIT	PAPER NUMBER
3653	

MAIL DATE	DELIVERY MODE
10/14/2009	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/821,011	LIMBURGER, CHRISTIAN	
	Examiner	Art Unit	
	JEFFREY A. SHAPIRO	3653	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *09 June 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-3,6-11 and 13-20* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-3, 6-11 and 13-20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☒ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date ___.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. Claims 1-3, 6-11 and 13-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bartholomew et al (US 6,622,064 B2) in view of Baker et al (US 6,980,888 B2).

Bartholomew discloses a dispensing machine for dispensing cosmetics, having a computer display (18 or 28) connected to computer controlled dispenser (12), that formulates and dispenses a cosmetic material, such as a hair treatment solution. Bartholomew further discloses means for packaging the dyes in the form of a bottle (40). Although Bartholomew discloses a nail polish solution, it would have been obvious to formulate and dispense hair treatment solutions since they are considered to be functionally equivalent to nail polish, since they are cosmetics that are formulated based upon a person's natural colorings, such as hair colorings.

Regarding "mixing the at least one selected dye with the selected formulation chemical, packaging the mixed at least one selected dye, and dispensing the packaged dyes", see Bartholomew at col. 4, lines 17-26 and packaging in the form of receptacle (20).

One ordinarily skilled in the art would have been motivated to use Bartholomew's mixing system to mix hair colorings since those customers interested in purchasing nail polish have a higher probability of also wanting hair colorings, as is common in the cosmetics industry.

Also, further regarding Claims 1-3, 6 and 7 and 15-20, MPEP 2115 states that in an apparatus claim, the material being worked upon does not carry patentable weight, and therefore does not limit the claim.

Bartholomew does not expressly disclose, but Baker et al discloses visually displaying plural optional changes to an existing hair color, indicating a desired change to the existing hair color, and means for choosing at least one hair color dye to mix with other dyes, as illustrated in figures 1-7, thus helping a customer in choosing a hair coloring solution. Note Baker at figure 4 illustrates a guide with a ratio bar to represent darker versus lighter shades relative to each other.

At the time of the invention, it would have been obvious to one of ordinary skill in the art to have displayed various information regarding the hair coloration process, such as taught by Baker, on Bartholomew's display, for the purpose of informing consumers about coloration results, and therefore increasing sales of Bartholomew's cosmetic products. See Baker, col. 1, lines 5-12.

Regarding a touch screen, note that Baker discloses use of touch screen, as well as other functionally equivalent screens, at col. 4, lines 7-14. It would have therefore been obvious to use a touch screen as an alternative to Bartholomew's display.

Response to Arguments

3. Applicant's arguments filed 11/21/08 have been fully considered but they are not persuasive. Applicant's Independent Claims include sets of limitations which state:

"means for receiving from the customer desired adjustments to the color, shade and brightness of the existing hair color"

"means for visually displaying to the customer a plurality of optional changes to the existing hair color, the optional changes derived from the desired adjustments received from the customer..."

"means for receiving from the customer, responsive to the means for visually displaying, an indication of a desired one of the optional changes to the existing hair color"

Bartholomew discloses an interactive computer that controls the dispenser which allows the customer to choose options for color and effect regarding nail polish, at col. 2, lines 26-44.

Baker discloses a display that provides a customer with options regarding hair coloring.

Applicant has included "mixing the at least one selected dye with the selected formulation chemical, packaging the mixed at least one selected dye, and dispensing the packaged dyes" in the independent claims. These limitations are found at Bartholomew, col. 4, lines 17-26 with packaging in the form of receptacle (20).

At the time of the invention, it would have been obvious to incorporate a hair coloring computer program that provides a customer with hair coloring adjustment and choice tools, as taught by Baker, in Bartholomew's nail polish device for the purpose of mixing hair coloring according to customer preferences. As recited above, mixing nail polish and hair coloring are considered similar since the dispensing and mixing operations and requirements are similar and those who require nail polish will likely also require or be interested in hair coloring as well. Baker provides the teaching of mixing hair coloring according to requirements for such coloring. Thus it would have been obvious to one of ordinary skill in the art to alter Bartholomew's nail polish device to help a customer choose hair coloring and mix the desired coloring according to customer preference' elicited by Bartholomew's customer computer interface.

Applicant asserts that Bartholomew's disclosed apparatus can not be used as prior art against Applicant's claims because Bartholomew only discloses mixing nail polish. However, Bartholomew mentions in col. 1, lines 10-15 and col. 2, lines 15-27, that cosmetics, not just nail polish, is intended to be formulated.

One ordinarily skilled in the art would have found it obvious to formulate any particular cosmetic with Bartholomew's mixing apparatus based upon current industry practice, programming the mixing of various tints and shades accordingly.

Further, note col. 2, lines 23-27, which states [t]hough applicable to the selection and preparation of cosmetics other than nail polish (such as, lip gloss, eye gel, cheek

gel, creams, lotions, perfumes and the like), the present invention is illustrated by reference to one example of a system for customizing a nail polish selection."

Therefore, Bartholomew clearly states that nail polish is only an example of the possible materials that can be mixed with this apparatus. Further, in light of Baker's disclosure and teaching as well as Bartholomew's clear invitation to mix other cosmetics substances, one ordinarily skilled would have found it obvious to mix hair colorings, as is standard in the cosmetics industry, as represented by Baker, so as to provide a range of custom-mixed cosmetics. It is well known that cosmetics such as nail polish and hair colorings are often sold in the same location since full service beauty salons provide both services. Often, customers want to match nail polish and hair colorings to each other for particular complexion or shadings of the individual.

In reference to Applicant's points i)-iii) on p.10 of the response of 5/25/07, it is noted that

i.) Bartholomew discloses mixing several components, such as mixable plural dyes at col. 2, lines 28-32;

ii.) Bartholomew's device visually displays optional changes applied to a body part, such as a hand with nails, at col. 4, lines 39-60, which is similar to taking a picture of a head with hair; and

iii.) selecting various options of dyes/components. See again, Bartholomew at col. 4, lines 39-60.

Applicant in the remarks of 11/21/08 have mentioned that "mixing the at least one selected dye with the selected formulation chemical, packaging the mixed at least one

selected dye, and dispensing the packaged dyes" overcomes Bartholomew and Baker. However, as mentioned above, these limitations are clearly found in Bartholomew.

On p. 10, lines 11-13 of Applicant's remarks, "Applicant submits that the two dispensing systems [i.e., nail polish and hair treatment] are not functionally equivalent because the chemistry of formulating hair colorants is substantially more complex." However, Applicant is not claiming chemical compositions in the claims and additionally, note again that apparatus claims cannot be limited by the item worked upon, i.e., the chemical mixed. Applicant's device and method concerns mixing of chemicals. Baker provides the teaching for mixing hair colorants as does Bartholomew itself at col. 2, lines 23-25, mentioning lip gloss, creams, perfumes, etc. Customer received adjustments, as claimed, do not preclude Baker's teaching of "inputing informatoin relating to the coloring product" at step (120) and "input[ing] information relating to the coloration desired." at step (130), as illustrated in figure 1 of Baker. This is construed as a customer desired adjustment. Further customer adjustments are considered to be taught and disclosed by Baker at steps (170 or 210) which recycles the original steps with further input of information relating to coloration and substrate color of the hair dye in steps (130, 140), therefore providing for additional customer input regarding the coloring by going back in the process to do prior steps again. See col. 8, lines 47-63 of Baker.

Thus, the combination of Bartholomew and Baker is considered to provide the necessary teaching for mixing the dyes based on existing hair color and desired change to said hair color, as cited in the rejection above.

Conclusion

4. THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

5. Any inquiry concerning this communication or earlier communications from the examiner should be directed to JEFFREY A. SHAPIRO whose telephone number is (571)272-6943. The examiner can normally be reached on Monday-Friday, 9:00 AM-5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patrick H. Mackey can be reached on (571)272-6916. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Jeffrey A. Shapiro/
Primary Examiner, Art Unit 3653

October 12, 2009